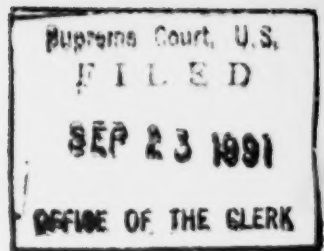


91-490



NO. _____

IN THE

COURT OF APPEAL OF THE UNITED STATES

OCTOBER TERM 1991

LEO MAGYAR and

MAGDALENA MAGYAR,

Petitioners

vs.

BENNET OLAN, ESQ.,

LESTER, FRIEDMAN, ESQ. and

LINDA HORNER, ESQ,

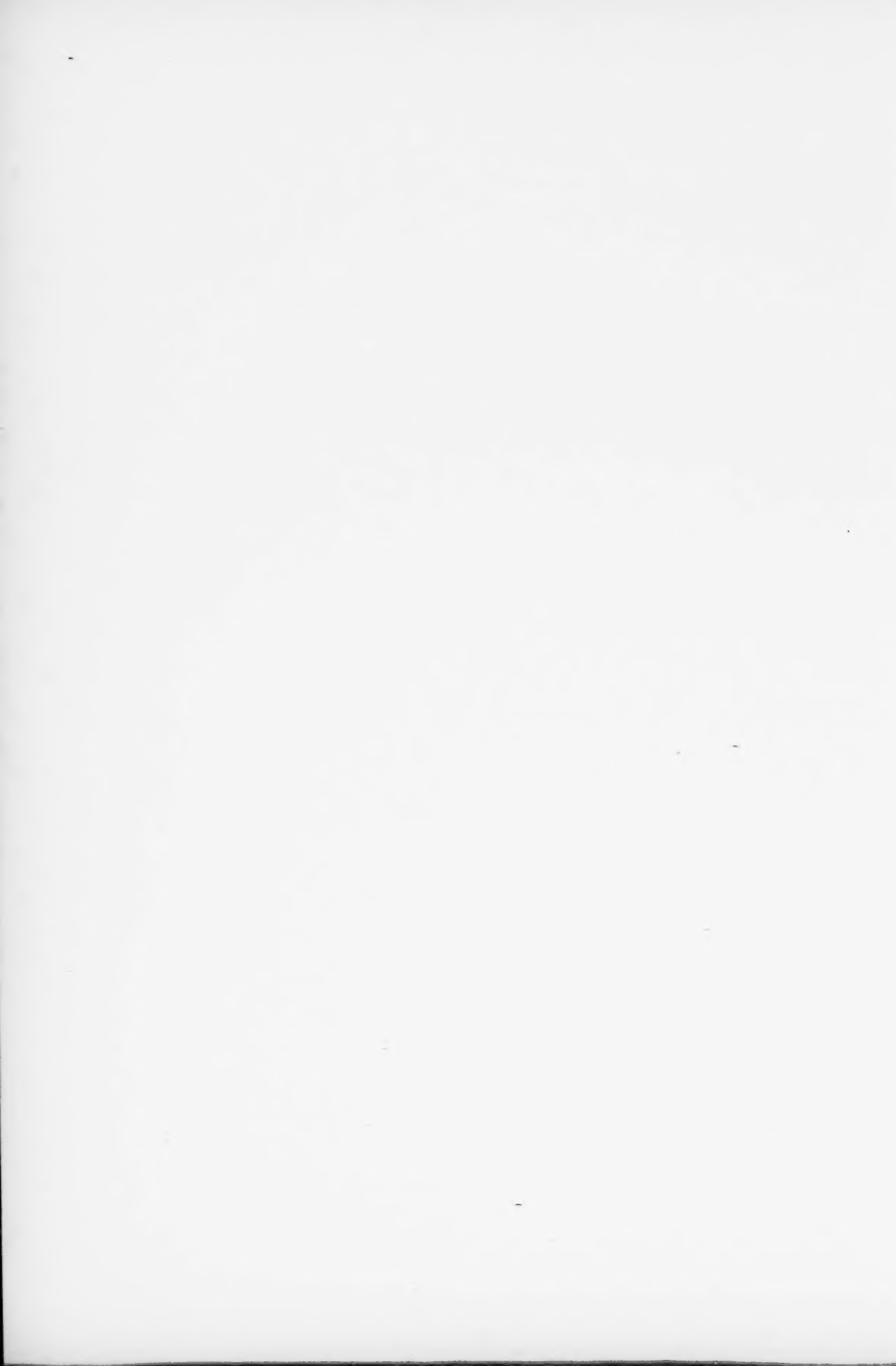
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

LEO D. MAGYAR
400 N. Martel Ave.
Los Angeles, CA 90036
Phone: (213) 653-3069
Petitioner Pro Persona

69



QUESTIONS PRESENTED FOR REVIEW

Whether the Law and Motion Judge to order, or to allow, Summary Proceedings, before opportunity is given to plaintiffs to present their cases is in violation of the plaintiffs' fundamental rights to be heard.

Whether the Law and Motion Judge can rightfully disregard petitioners' Motion for Early Trial Setting Date filed before the commencement of Summary Proceedings.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	3
Jurisdiction and Statutory Provisions Involved	3
Manner in Which Constitutional Claims are raised	4
Statement of the Case	6
Reasons for Granting the Writ	20
Conclusion	
Appendix:	
A. Supreme Court California 1a Denial of Review (626.91)	1A
B. Court of Appeals California Opinion (4.4.91)	1B
C. Court of Appeals California Denial of Rehearing (4.23.91)	1C
D. Superior Court of California Notice of Ruling (5.14.90)	1D

- | | | |
|----|---|----|
| E. | Superior Court of California
Order Granting Motion for Summary
Judgement and Judgement (1.5.90) | 1E |
| F. | Superior Court of California
Motion of Ruling (12.20.89) | 1F |
| G. | Superior Court of California
Notice of Ruling (9.18.89) | 1G |

iv
TABLE OF AUTHORITIES

	Page
Gigax v. Ralston Purina Co. (1982) 136 CA 3d 591, 186 CR 395	24
Hayman v. Block 176 CA 3d 629, 638-639, 222CR 293, 298	22
Maxwell v. Coburn (1980) 105 3d 180, 185, 163 CR 912, 914	22
Segura v. Brundage (1979) 91 CA 3d 19, 28, 153 CR 777, 782	23
Societe International Pour Participations Industrielle et Commerciales S.A. v. Rogers, 357 U.S. 197, 209 (1958),	10
Weid & Brown: GUIDE (10:10)	21

CONSTITUTION & RULES

California Insurance Code 790.03, and subsections	7
Court Code Sec. 68600 (AB3300)	9
Fifth Amendment of the Constitution	3,5,10
Eighth Amendment of the Constitution	5,18
U.S. Supreme Ct Rule 13	3
CCP §36 Motion for Preference	24

IN THE
COURT OF APPEAL OF THE UNITED STATES

OCTOBER Term 1991

LEO MAGYAR and
MAGDALENA MAGYAR,

Petitioners

vs.

BENNET OLAN, ESQ.,
LESTER, FRIEDMAN, ESQ. and
LINDA HORNER, ESQ.

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

Petitioner Leo Magyar, respectfully
prays that a writ of Certiorari issue to
review the California Supreme Court's
Denial, entered on June 26, 1991, to review
the California Court of Appeals Confirma-
tion of the Summary Judgement ordered by
the Superior Court of California.

OPINIONS BELOW

The Second Appellate District,
Division One (No. B051691, S021010) in the
Supreme Court of the State of California,

IN BANK DENIED, Appellant's petition for review of the Opinion of California Court of Appeal; Leo Magyar et al. v. Olan, Friedman, et al. The Denial of the California Supreme Court is reproduced in Appendix A. The reproduced unpublished Opinion of the California Court of Appeals (B051691, Super Ct No. C603609, dated April 4, 1991), confirming the Summary Judgement appears in Appendix B.

The California Court of Appeals Denial of Petition for Rehearing in Appendix C.

The reproduced Order of Granting Summary Judgement and the Notices of Ruling of the Superior Court of California are Appended as follows: Notice of Ruling dated 5/14/90 in Appendix D, Order Granting Summary Judgement, dated January 5, 1990 in Appendix E, Notice of Ruling dated December 20, 1989 in Appendix F, Notice of Ruling dated September 18, 1989 in Appendix G.

JURISDICTION

The Denial of the California Supreme Court to Review the case was entered on June 26, 1991. This petition is filed within 90 days of that date. United States Supreme Court Rule 13.

Federal questions conflicting the Fifth and the Eighth Amendment to the Constitution were timely raised by petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION - FIFTH AMENDMENT:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia,

when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

UNITED STATES CONSTITUTION -
EIGHTH AMENDMENT.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

MANNER IN WHICH CONSTITUTIONAL
CLAIMS WERE RAISED-

The very first sentence in the
APPELLANT'S OPENING BRIEF to the California

Court of Appeals was: "Did the Superior Court abuse its discretion and violate appellant's due process rights by directing respondents to move for summary judgement and by granting summary judgement?" Please see Fifth Amendment to the United States Constitution.

On page 21 of the Brief (supra) petitioners state as follows: "To represent that the judgement was punitive is nothing short of putting the blame on the court, for punishing for the conduct of the one, the other plaintiff also, which judgement would be, while far not as grave, but just as unconstitutional as . . ."

The above was with reference to the issue presented by respondents in their Motion for Summary Judgement in conflict with the Eighth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Respondent-defendants have represented as attorneys the Petitioner-plaintiffs in a lawsuit against the United Fire Insurance Company (hereafter UFIC) in a lawsuit (hereafter underlying case) claiming unpaid benefits promised by health insurance policies.

Petitioners, while they were husband and wife, each of them have individually owned their policies, and were separate plaintiffs.

Petitioner plaintiff pro se Leo Magyar, a high school graduate, has limited command of English, and has no prior experience in legal matters.

Plaintiff Magdalena Magyar has worked for years as a radiation therapist in hospitals and, had she been asked at the trial of the underlying case, she could

have competently testified on questions relative to hospitals, doctors, and medical treatments.

Both plaintiffs have been American citizens since much before the underlying action and before the insurance policies offered by the defendant insurer were accepted by them.

Respondent attorneys have filed suit (NOV. 22, 1982) against the UFIC in the Superior Court of California for Breach of Contract, Intentional tort, Declaratory relief, and breach of Insurance Code section 790.03 with the claims being supported by the subsections (h) (2), (h) (3), (h) (4), (h) (5), and (h) (13) asking for damages of \$56,067.64 plus 10% interest and for exemplary damages of \$500,000.00 (CT 45-52).

The policies involved were: one to each of the petitioner-plaintiffs, insured

by Valley Forge Insurance Company policies assumed by the UFIC and one of each of the plaintiffs, issued by the UFIC. All of these policies were promising nominal per diem benefits payable on hospital stays, and not on expense incurred basis. In addition, petitioner Leo Magyar owned a policy offered and issued by the UFIC with benefits for hospital, medical and surgical expenses limited to and aggregate benefit of three thousand dollars.

The computation of the damage of \$56,067.64 was done by respondent-attorneys (CT 204-208) with their listing marking the unprecedented variations and frequency of the years-long systematic violation of just about every subsection of sect 790.03 of the California Insurance Code.

Lacking opposition on the part of the Respondents, the underlying case was subsequently removed to the US District

Court which, after an aborted trial, ruled that the dismissal of the case was on the merit (CT 220-221).

On June 9, 1986, Petitioners filed suit against Respondents indicating tort as the reason.

The instant case is provoked by the Respondent-defendants' action and failure to act before, during, and after the trial of the underlying case.

The Superior Court has assigned the case to its Department 18 to be processed under the Rules of a pilot program to be developed i.a. with the solicited contributory suggestions of experienced attorneys, to reduce the delays in trials. This project, known as the "Fast Tract", is operating under Court-Code Sec. 68600 also known as AB3300.

During the courses of the proceedings, Petitioner Magdalena Magyar has deceased at

age 76 (CT 138) .

The present petition is on the California Court of Appeals Opinion confirming the Summary judgement brought in the Superior Court of California.

The purpose of the Summary Proceedings is to find whether there is at least one triable issue.

And, as stated in (Dvorin v. Appellate Dept. (1975) 15c 3d 648, 125 CR 771)

"Summary Judgement cannot, however, be ordered by the court on its own motion"

In their Opening Brief (on page 15) petitioners pointed out that the Law and Trial Judge directed Respondents to move for Summary Judgement and have shown that the Fifth Amendment to the Constitution ensures that no person will be deprived of property without the due process of law. The United States Supreme Court, in Societe International Pour Participations

Industrielle et Commerciales S.A. v. Rogers, 357 U.S. 197, 209 (1958), recognized that "there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for hearing on the merits of his cause."

Respondents were unable to controvert this fact.

The California Court of Appeals' statement that "neither is there any evidence the trial court directed defendants to move for summary judgement" is erroneously taken as if any motion for summary judgement had been previously filed, it had not been any Status Conference held.

In addition, summary proceedings should not be granted, due to the fact, that the petitioner's motions listing about

twenty causes of action were twice before the Court of Appeals and before the Law and Motion Judge (CT 14-22, 212-49). A third sampling of the issues claimed was included in the Appellant's Opening Brief, as follows:

Pages numbered 3 through 10 of Exhibit No. 2S (CT 15-22), enclosed to the opposition of the Appellants to the motion of the Respondents for Summary Judgment, lists the damaging actions, the negligence and the lack of understanding the underlying case by the Respondents. Some of these causes of actions are listed below:

The Respondents

- did not name in the Complaint as Defendants one of the insurers who issued two of the policies in the case,
- kept Appellants uninformed on the status of the case by hiding important

documents from them,

- did not properly oppose the transfer of the case to the U.S. District Court,
- carried the case without being informed on the rules of the court,
- neglected to call in witnesses for the trial,
- failed to prepare Appellants-Plaintiffs for witnessing,
- did not discuss the case with Appellants,
- discredited plaintiffs several times before the Court, saying that the plaintiff wanted his day in the court and that the plaintiff wanted the sun, the moon and the stars,
- appeared unprepared to assist Appellants at the depositions,
- failed to prepare the case for trial,
- failed to present the proofs at the

trial,

- failed to point out that the adverse party
 - a) lied
 - b) manipulated documents
 - c) deceived the Court
 - d) extorted insurance policy provisions,
- appeared at the trial unprepared, uninformed, uninterested, preconditioned to lose the case,
- did not understand the policy contract or the dispositions of the laws,
- abandoned their client-Appellants, contumaciously to the order of the Court,
- confirmed the court order that the case was tried on the merits, and
- refused to timely release the files, resisting the court order, and they did so in spite of the multiple

requests by attorney J. Lichtman and on behalf of the Appellants.

In their Opening Brief, petitioner cited authors R.I. Weil and I.A. Brown, Jr. relating (10:144,1) Courts follow a three prong analysis in ruling a motion for summary judgement....." ".....First what issues are framed by the pleadings, since the motion and opposition must be addressed to these issues (10:145.1)?"

None of the above issues were mentioned in the respondents' motion. The Court of Appeals was thoughtless about it.

The court of appeals was thoughtless as well about the petitioners calling the Court's attention to the fact that the issues raised by the respondents as non-disputed were sham pleadings, presenting no real issues of facts to be determined by court procedures (CT 41-43). Exceptions to

it are the issues #5, stating that because of the plaintiff's refusal to answer question the court dismissed the case and issue #7 which was supported by the declaration of John Taylor.

Notwithstanding the fact that none of the issues were framed to the claims pleaded by petitioners, respondents (CT 42) and declarant (CT 44) stated that the underlying case was dismissed by the court because of the refusal by plaintiff to answer questions while witnessing.

This position of the respondents was adopted by the Court of Appeals of California in the last entry of part II of the Opinion:

"In short, it is unequivocally clear that Mr. Magyar's conduct in the face of repeated warnings from the trial judge did, in the end, result in the dismissal of the underlying action."

The above Opinion of the California Court of Appeals is in striking conflict with the Opinion of the United States Court of Appeals for the Ninth Circuit which read in part as follows:

"Point #5 in Discussion . . . "if the dismissal had been a sanction for failure to comply with a court order, might have amounted to an abuse of discretion..."

"However, the record shows that plaintiffs were scheduled to present at least one other witness after Mr. Magyar. When plaintiff's counsel declined to produce it, the record was left devoid of evidence supporting the Magyar's case... With nothing in the record to support plaintiff's case, United was clearly entitled to a dismissal." Copy of the above cited Opinion has been enclosed as Exhibit (#11) to Appellant's Briefs.

The California Court of Appeals has also overlooked that the statement in Mr. Taylor's Declaration (CT 44) showing that the case was dismissed due to plaintiff's failure to respond to examination...", and that the issues #4 and 5 in respondents separate statements of undisputed material facts to read: "...plaintiff Leo Magyar refused to answer many of the questions posed..." and "5. Because of this refusal by plaintiff, the court dismissed the case in its entirety." are, both statements, virtual allegations that the US District Court was covering up with its Judgement on the merit, penalties, imposed not only on the witnessing party, but on the other separate plaintiff who, except of spelling her name, wordlessly attended the trial, which judgement had been too cruel and too unusual punishment for her, conflicting the Amendment VIII of the Constitution.

Though without reference to the constitutional provision, this issue was brought up in section C of the Argument in the Appellant's Opening Brief (Page 21) as follows:

To represent that the judgement was punitive is nothing short of putting the blame on the District Court for punishing for the conduct of the one the other plaintiff also . . .

Attached to their motion in Opposition to Motion for Summary Judgement, petitioners have submitted as an exhibit (#3) the copy of the last page of the Reporter's Transcript on the underlying case and reproduced the words of the dismissal, the court ordering"

"PLAINTIFF'S NEXT WITNESS MISS HORNER:
PLAINTIFF HAS NO WITNESS TO CALL, YOUR
HONOR.

THE COURT:

THAT BEING THE CASE, THIS MATTER IS
DISMISSED ON THE COURT'S MOTION AND I GRANT
FURTHER THE DEFENDANT'S MOTION EARLIER
MADE. (CT 161-162).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the
following reasons:

The case has never reached trial and
in essence not even status conference, as
the conference was used only the Law and
Motion Judge to direct respondents to move
for summary judgement.

The subject of the present petition is
on the granting the Summary Judgement by
the Superior Court of California, and on
the Confirmation of the Judgement by the
California Court of Appeal.

In summary proceedings the motion must
be directed to issues raised by pleadings.

The material facts for purpose of summary judgement motion are those pleaded. Thus, the declarations or other evidence submitted must be addressed to the claims raised in the pleadings. (Weil and Brown) Guide (10:10)

None of the issues pleaded were brought up by respondents in that motion. John Taylor, who had admitted that he was not designated as expert witness in this law suit and that he had reviewed several (not all of the) materials, did not address in his declaration to any of the issues pleaded by petitioners. In fact, delcarant J. Taylor produced no admissible evidence and the declaration was nothing more than hearsay. His opinion was his belief, and not personal knowledge of facts.

The declaration must:

- Show the declarant's personal knowledge and competency to testify.
- State evidenciary facts, not conclusions, and
- Not contain inadmissible hearsay or opinions (Hayman v. Block (1986) 176 CA 3d 629, 638-639, 222 CR 293, 198)

Moreover: "The opposing party has no burden to controvert the moving party's declarations if such declarations themselves,... disclose a triable issue" of fact. (Maxwell v. Coburn 1980) 105 3d 180, 185, 163 CR 912, 914).

The declaration is in conflict with the opinion of the U.S. Court of Appeal.

"Defendant's burden is to dispute every claim or theory presented in the complaint, even those deficiently

pleaded..." (Segura v. Brundage (1979) 91 CT 3d 19,28, 153 CR 777, 782).

Non of the twenty claims presented in petitioners' pleadings have been disproved.

In the order Granting Motion for Summary Judgement (Appendix E) it is stated "Having considered all of the evidence set forth in the papers submitted, and the inferences reasonably deductible therefrom, the Court determined that there is not triable issue as to any material fact and that defendants are entitled to judgement is a matter of law".

The order was prepared by respondents and was signed by Judge of the Superior Court.

If it is not specified that the judgement was rendered by the Judge, while in his capacity of Law and Motion Judge. "However a law and motion judge has no power to weigh evidence or references..."

(Gigax v. Ralston Purina Co. (1982) 136 CA 3d 591, 186 CR 395).

Weighing evidence or inferences is trying, which means that there is issue to be tried at trial.

Most importantly, in conflict with the Fifth Amendment to the Constituion it was denied plaintiffs to present their cases.

One other reason why certiorary should be issued is that Summons indicated TORT as issue, what includes abuse of fiduciary responsibilities. Part of the \$56,000 claim in the Summons disappeared, presenting claims for \$13,000 at the trial of the underlying case.

The conclusion; certiorary should be granted because petitioner moved for early trial setting date before summary proceedings have commenced.

"CCP-§36 Motion for Preference in Civil Action - Party who is over 70...

(a) A party to a civil (1) action who is over the age of 70 years may petition the court for a preference, which the court shall grant if the court makes all of the following findings:

(1) The party has a substantial interest in the action as a whole."

This petition of the petitioner was not granted by the Superior Court of California.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that a writ of certiorari issue to review the judgement of the California Supreme Court.¹

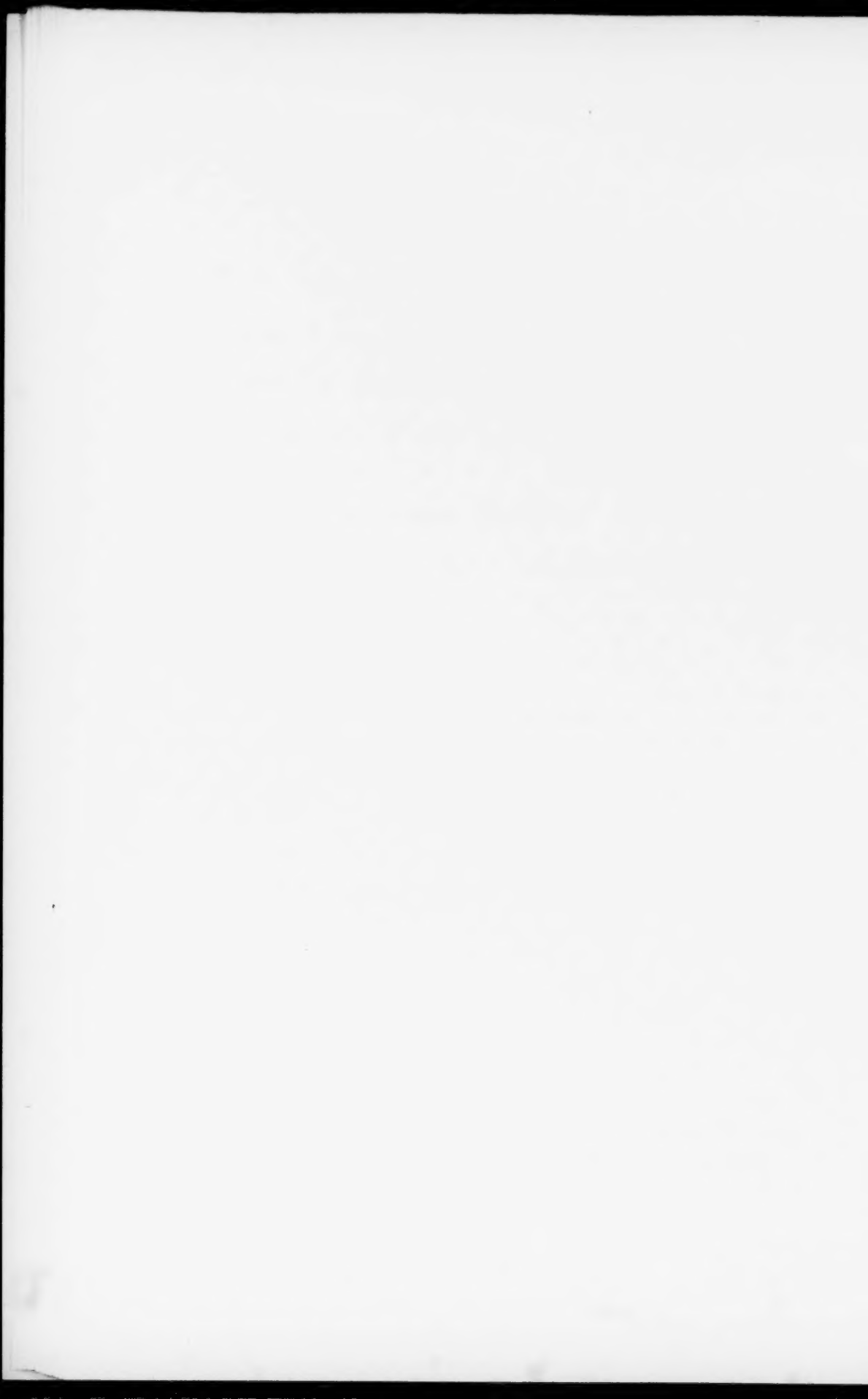
Dated, September 21, 1991

Respectfully submitted,

Leo D. Magyar
400 No. Martel Avenue
Los Angeles, CA 90036
Petitioner Pro Per

¹ If this Court elects to summary direct the Superior Court of California to hold a trial of the case, it is requested to order a jury trial and the respecting petitioner's motion for an early trial setting date.

APPENDICES



APPENDIX A

DENIAL OF PETITIONER'S
PETITION FOR REVIEW
SUPREME COURT OF CALIFORNIA
MAGYAR V. OLAN (B051691, S021010)
DATED: JUNE 26, 1991

Second Appellate District Division One,

No. B051691

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

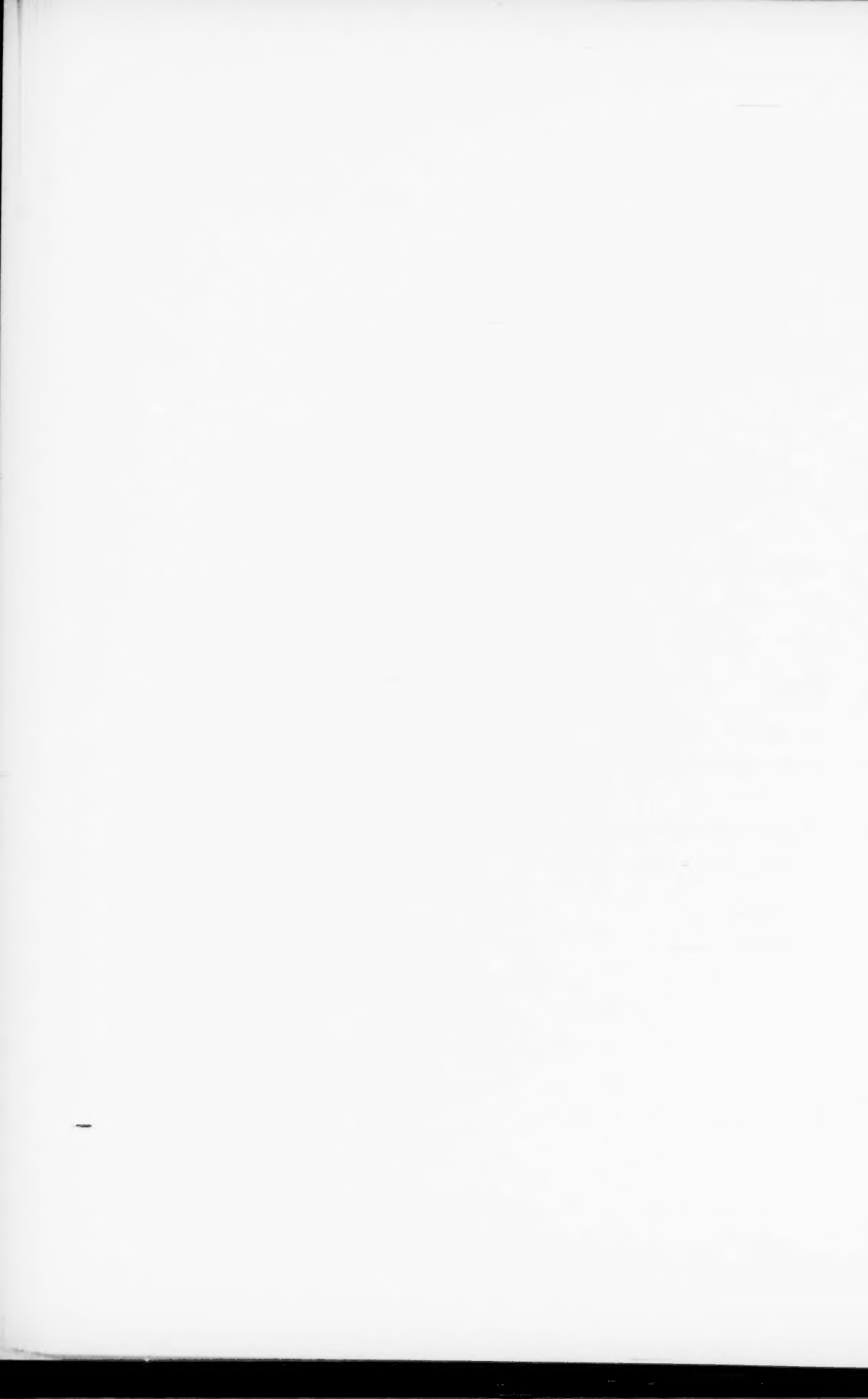
LEO MAGYAR, Et Al., Appellants

v.

OLAN & FRIEDMAN, Et Al., Respondents

Appellant's petition for review DENIED.

Acting Chief Justice



APPENDIX B

OPINION OF THE
APPELLATE COURT OF CALIFORNIA
(SECOND APPELLATE DISTRICT DIV. ONE)

MAGYAR V. OLAN (B051691, C603609)

DATED: APRIL 4, 1991

NOT TO BE PUBLISHED

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT DIVISION ONE

LEO MAGYAR and MAGDALENA) Case No.C603609
MAGYAR, B051691)

Plaintiffs and Appellants) NOTICE OF RULING

vs.)

OLAN & FRIEDMAN,)
BENNET OLAN,)
LESTER FRIEDMAN and)
LINDA HORNER,)
Defendants and)
Respondents.)

APPEAL from a judgment of the Superior
Court of Los Angeles County, Eric E.

Younger, Judge. Affirmed.

Leo D. Magyar, in pro. per., for Plaintiffs
and Appellants.

Baker, Silberberg & Keener and Thomas F.
McAndrews for Defendants and Respondents.

INTRODUCTION

Plaintiffs Leo Magyar and Magdalena Magyar appeal from a summary judgment entered in favor of defendants Olan & Friedman, Bennet Olan, Lester Friedman and Linda Horner.

STATEMENT OF FACTS

Defendants represented plaintiffs in a federal suit against United Fire Insurance Company, in which plaintiffs sought declaratory relief and alleged breach of contract and fraud. Specifically, plaintiffs alleged United Fire Insurance Company acted in bad faith in refusing to make payments on plaintiffs' claims for health insurance benefits. United Fire Insurance Company defended the action by asserting plaintiffs were attempting to obtain insurance proceeds fraudulently by visiting a number of European health spas

and then claiming the visits as hospital stays. In addition, United Fire Insurance Company asserted plaintiff Leo Magyar had made material misrepresentations when applying for the policies.

During the trial of the underlying action, plaintiff Leo Magyar repeatedly gave non-responsive answers to questions asked on cross-examination. He continued to do so even after the trial judge gave him several warnings and expressly directed him to give responsive answers. Each of the questions to which he gave a non-responsive answer posed a potential danger to the success of plaintiffs' case. After warning Mr. Magyar that another non-responsive answer would result in the striking of his testimony, the district court judge took precisely that step when Mr. Magyar again gave a non-responsive answer. Defendants informed the court the plaintiffs had no

other witnesses to offer, after which the district court dismissed the case.

John Taylor is an expert in the field of legal malpractice. In his opinion, defendants' representation of plaintiffs in the underlying action complied with the professional standard of care and did not result in the dismissal of the underlying action.

CONTENTIONS

I

Plaintiffs contend the trial court erred in granting summary judgment, in that there clearly are triable issues of material fact.

II

Plaintiffs further contend the trial court violated their right to due process of law by directing defendants to move for

summary judgment, predetermining the outcome of the summary proceedings and denying plaintiffs an early trial setting date.

III

Finally, plaintiffs assert the trial court erroneously continued to handle the case under the delay reduction project.

DISCUSSION

I

Plaintiffs contend the trial court erred in granting summary judgment, in that there clearly are triable issues of material fact. We disagree.

Summary judgment properly is granted where the "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters as to which judicial notice . . . may be taken" in

support of and opposition to the motion "show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subds. (b), (c).) Summary judgment is a drastic procedure to be used with caution; accordingly, the moving papers will be strictly construed while the opposing papers will be liberally construed. (Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092, 1107.)

In order to secure summary judgment, the moving party must demonstrate that there is no material question of fact requiring trial on any hypothesis whatsoever. (Molko v. Holy Spirit Assn., supra, 46 Cal.3d at p. 1107.) In determining the motion, the court must consider presumptions and draw inferences from the facts adduced where the inference

is the only reasonable one which may be drawn (see Unjian v. Berman (1989) 208 Cal.App.3d 881, 884, review den. May 23, 1989; Hooks v. Southern Cal. Permanente Medical Group (1980) 107 Cal.App.3d 435, 441), but has no power in a summary proceeding to weigh one inference against another or against other evidence (*id.* at p. 442; Brown v. City of Fremont (1977) 75 Cal.App.3d 141, 145). (Code Civ. Proc., § 437c, subd. (c).)

On appeal, review is limited to the facts shown in the evidence submitted in support of and opposition to the motion. (McDaniel v. Sunset Manor Co. (1990) 220 Cal.App.3d 1, 5; Garcia v. Wetzel (1984) 159 Cal.App.3d 1093, 1095.) Since the trial court's decision is one of law, the reviewing court independently considers the construction and effect of the supporting and opposing papers. (McDaniel, *supra*, at

p. 5; Hoffman v. Citadel General Assurance, Ltd. (1989) 194 Cal.App.3d 1356, 1362.) Any factual conflicts will be resolved in favor of the party opposing the motion. (Zeilman v. County of Kern (1985) 168 Cal.App.3d 1174, 1178.)

Notwithstanding plaintiffs' characterizations, the instant action really involves nothing more than a claim of legal malpractice. While plaintiffs allege numerous omissions on the part of the defendants, each of these omissions pertains to the manner in which the defendants prosecuted the underlying action on plaintiffs' behalf. In one instance, plaintiffs do allege a seemingly unrelated breach of contract, asserting defendant Bennet Olan contracted to provide his personal services in the prosecution of the underlying action rather than the services of his associates, but he did not do so.

Assuming the truth of the allegation, whether plaintiffs were damaged again turns on the manner in which the defendants prosecuted the underlying action. If either there was no professional negligence or any professional negligence was not the proximate cause of plaintiffs' failure to prevail in the underlying action, then plaintiffs suffered no damage from the alleged breach of contract.

The maintenance of a cause of action for legal malpractice requires evidence of the existence of an attorney-client relationship and a wrongful act or omission which proximately caused particular damages. (Sukoff v. Lemkin (1988) 202 Cal.App.3d 740, 744.) The standard of skill applied in determining whether there was a wrongful act or omission is that of members of the bar practicing in a similar locale under similar circumstances. (Lipscomb v.

Krause (1978) 87 Cal.App.3d 970, 976.)

Since each of the foregoing elements is essential to the maintenance of the action, a defendant will be entitled to a summary judgment upon a showing that there is no triable issue of fact as to any one of the elements.

Generally, expert testimony on the professional standards of care and the consequences of any breach will be required to prove or disprove a claim of legal malpractice, for this is not a matter of common knowledge. (Lipscomb v. Krause, supra, 87 Cal.App.3d at p. 976; see also Wright v. Williams (1975) 47 Cal.App.3d 802, 810.) Accordingly, expert testimony on the subject is conclusive proof of the propriety or impropriety of particular conduct. (Lipscomb, supra, at p. 976.)

In support of their motion for summary judgment, defendants submitted the

declaration of John Taylor, an attorney well known in the community for his expertise in matters of civil litigation and legal malpractice. In Mr. Taylor's opinion, defendants' representation of plaintiffs complied with the applicable standard of care and did not result in the dismissal of the case. Rather, the case was dismissed after Mr. Magyar's non-responsive answers to questions on cross-examination resulted in the striking of his testimony. Plaintiffs presented no controverting expert testimony. Hence, Mr. Taylor's opinion is conclusive proof of defendants' competent representation unless other evidence reveals the dismissal may indeed have resulted from defendants' conduct rather than that of Mr. Magyar.

In plaintiffs' view, this is precisely the case. They argue it was defendants' negligent failure to call any further

witnesses after Mr. Magyar's testimony was stricken that resulted in the dismissal of the case.

Defendants attached to their motion for summary judgment most of the trial transcript in the underlying action. Upon reading the transcript, it is clear there was no point in calling further witnesses -- even Mrs. Magyar -- after Mr. Magyar's testimony was stricken. It was Mr. Magyar alone who submitted the claims to and communicated with the insurance company. Thus, it was he alone who could testify to the supporting documentation he submitted for each claim and to the contents of his communication with the insurance company. Moreover, it is clear only Mr. Magyar could have authenticated much of the documentary evidence crucial to plaintiffs' success in the underlying action. In other words, had defendants called additional witnesses the

underlying action might have been concluded with a judgment in favor of the underlying defendants rather than with a judgment of dismissal, but the end result would have been the same.

In short, it is unequivocally clear that Mr. Magyar's conduct in the face of repeated warnings from the trial judge did, in the end, result in the dismissal of the underlying action. Accordingly, there is no evidence defendants breached their professional duties in any manner, let alone in a manner which proximately caused plaintiffs' injury. It necessarily follows that the trial court did not err in granting summary judgment.

II

Plaintiffs further contend the trial court violated their right to due process of law by directing defendants to move for

summary judgment, predetermining the outcome of the summary proceedings and denying plaintiffs an early trial setting date. We perceive no merit in the contention.

Plaintiffs rely on the following sequence of events as support for the foregoing theory: On September 13, 1989, the parties attended a status conference in the instant action. At the conclusion of the conference, the court ruled it would hear defendants' motion for summary judgment on December 11, 1989 and, if the motion were denied, then would hold a status conference to determine whether to send the matter to arbitration or to set a trial date. On November 8, 1989, plaintiffs requested the release of defendants' work product. On November 22, 1989, plaintiffs moved for an early trial setting date. Plaintiffs state the trial court failed to

rule on these motions before the hearing on the motion for summary judgment, but there is nothing in the record indicating this is the case. Neither is there any evidence the trial court directed defendants to move for summary judgment.

Plaintiffs perceive in these events ominous proof that the trial court had predetermined the motion for summary judgment. In their view, the failure to rule on the motions -- a fact not established by the record -- and the court's intention to set a trial date only if the motion were denied clearly indicate the court had decided in advance to grant the motion. Absolutely nothing in the record -- apart from pure conjecture and speculation -- supports that conclusion. If anything, the trial court's pronouncement of the procedure to be followed should the motion for summary judgment be denied

supports the contrary conclusion.

There is nothing inherently suspicious in the trial court's willingness to entertain a motion for summary judgment before setting a trial date. The purpose of the summary judgment procedure is to penetrate the language of the pleadings and ascertain whether a cause has any substance in fact. (Chern v. Bank of America (1976) 15 Cal.3d 866, 873; Lucchesi v. Giannini & Uniack (1984) 158 Cal.App.3d 777, 782.) Hence, if it appears it may be possible to resolve a matter by summary judgment, it is only sensible to delay setting a trial date until such a motion has been heard.

In short, there is not a scintilla of evidence in the instant record that the trial court infringed upon any of plaintiffs' due process rights. Whether plaintiffs were entitled to an early trial date became moot once the trial court

granted the motion for summary judgment.

III

Finally, plaintiffs assert the trial court erroneously continued to handle the case under the delay reduction project. The assertion is irrelevant to consideration of the propriety of the summary judgment and, in any event, would have had no effect on the outcome of the summary proceeding. The motion for summary judgment was heard more than three years after plaintiffs filed their complaint, affording them ample time for discovery. They knew three months in advance when the motion for summary judgment would be heard. This afforded them ample time to prepare an opposition to the motion, time far in excess of that mandated by Code of Civil Procedure section 437c.

The judgment is affirmed.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

ORTEGA, J.

VOGEL, J.

APPENDIX C

DENIAL OF PETITION FOR REHEARING
OF THE COURT OF APPEAL OF CALIFORNIA

MAGYAR V. OLAN

(DIVISION 1, APRIL 23, 1991)

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 1 DATE 04/23/91

Leo D. Magyar
400 N. Martel Avenue
Los Angeles, CA 90036

RE: Magyar, Leo
VS.
Olan, Bennett
2 Civil B051691
Los Angeles NO. C603609

THE COURT

PETITION FOR REHEARING DENIED.

APPENDIX D

NOTICE OF RULING

WORDED AND SIGNED BY RESPONDENTS

SUPERIOR COURT OF CALIFORNIA

MAGYAR V. OLAN C603609

MAY 14, 1990

Thomas F. McAndrews, #120014
BAKER, SILBERBERG & KEENER
2850 Ocean Park Boulevard
Suite 300
Santa Monica, California 90405
Telephone: (213) 399-0900

Attorneys for Defendants
BENNET OLAN, ESQ.
LESTER FRIEDMAN, ESQ.
LINDA HORNER, ESQ.
CHARLES A. CORREIA, ESQ.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

LEO MAGYAR and MAGDALENA	)	Case No.C603609
MAGYAR,)	
)	
Plaintiffs,	)	NOTICE OF RULING
)	
vs.)	
)	
BENNET OLAN, et al.,)	
)	
Defendants.)	
)	

TO PLAINTIFFS LEO MAGYAR and MAGDALENA
MAGYAR, In Propria Persona:

The Motion of plaintiffs, Leo MAGYAR
and MAGDALENA MAGYAR, for Reconsideration

of the Court's earlier ruling granting summary judgement as to defendants, came on for hearing on May 8, 1990 in Department "18" of the above-entitled court before the Honorable Eric Younger. Plaintiff, LEO MAGYAR, appeared in Propria Persona. Defendants appeared by way of counsel, Thomas F. McAndrews, of the law firm of Baker, Silberberg & Keener.

Having considered all of the evidence set forth in plaintiffs' Motion for Reconsideration as well as defendant's opposition thereto, and listening to oral argument from plaintiff, the court ordered as follows:

- 1) That plaintiffs' Motion for Reconsideration be denied.
- 2) That defendants give notice.

DATED: May 14, 1990

BAKER, SILBERBERG & KEENER

THOMAS F. McANDREWS
Attorney for Defendants,
BENNET OLAN, ESQ.
LESTER FRIEDMAN, ESQ.
LINDA HORNER, ESQ.
CHARLES A. CORREIA, ESQ.

APPENDIX E

ORDER GRANTING MOTION
FOR SUMMARY JUDGEMENT
AND JUDGEMENT
SUPERIOR COURT OF CALIFORNIA
MAGYAR V. OLAN (C603609)
DATED: JANUARY 5, 1990

BAKER, SILBERBERG & KEENER
2850 Ocean Park Boulevard
Suite 300
Santa Monica, California 90405
Telephone: (213) 399-0900

Attorneys for Defendants
BENNET OLAN, ESQ.
LESTER FRIEDMAN, ESQ.
LINDA HORNER, ESQ.
CHARLES A. CORREIA, ESQ.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

LEO MAGYAR and MAGDALENA	)	Case No.C603609
MAGYAR,)	
)	
Plaintiffs,	)	ORDER GRANTING
	)	MOTION FOR
vs.	)	SUMMARY
	)	JUDGEMENT AND
BENNET OLAN, et al.,	)	JUDGEMENT
)	
Defendants.)	
)	

TO: PLAINTIFF, LEO MAGYAR, IN PROPRIA
PERSONA:

THE MOTION OF DEFENDANTS BENNET OLAN,
ESQ., LESTER FRIEDMAN, ESQ., LINDA HORNER,
ESQ., AND CHARLES A. CORREIA, ESQ. for

Summary judgement came on regular hearing by the court, the Honorable Eric Younger presiding, on December 11, 1989.

Defendants appeared by counsel Rick D. Navarrette of the law firm of Baker, Silberberg & Keener. Plaintiff appeared in propria persona.

Having considered all of the evidence set forth in the papers submitted, and the inferences reasonably deductible therefrom, the Court determined that there is not triable issue as to any material fact and that defendants are entitled to judgement as a matter of law.

IT IS ORDERED, ADJUDGED, AND DECREED that the Motion of defendants BENNET OLAN, ESQ., LESTER FRIEDMAN, ESQ., LINDA HORNER, ESQ., and CHARLES A. CORREIA, ESQ. be, hereby is, granted and, further, that plaintiff shall take nothing by way of his complaint.

DATED: JANUARY 5, 1990

JUDGE OF THE SUPERIOR COURT

APPENDIX F

NOTICE OF RULING

WORDED AND SIGNED BY RESPONDENT

SUPERIOR COURT OF CALIFORNIA

MAGYAR V. OLAN (C603609)

DATED: DECEMBER 20, 1989

BAKER, SILBERBERG & KEENER
2850 Ocean Park Boulevard
Suite 300
Santa Monica, California 90405
Telephone: (213) 399-0900

Attorneys for Defendants
BENNET OLAN, ESQ.
LESTER FRIEDMAN, ESQ.
LINDA HORNER, ESQ.
CHARLES A. CORREIA, ESQ.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

LEO MAGYAR and MAGDALENA	)	Case No.C603609
MAGYAR,)	
)	
Plaintiffs,	)	NOTICE OF RULING
)	
- vs.)	
)	
BENNET OLAN, et al.,)	
)	
Defendants.)	
)	

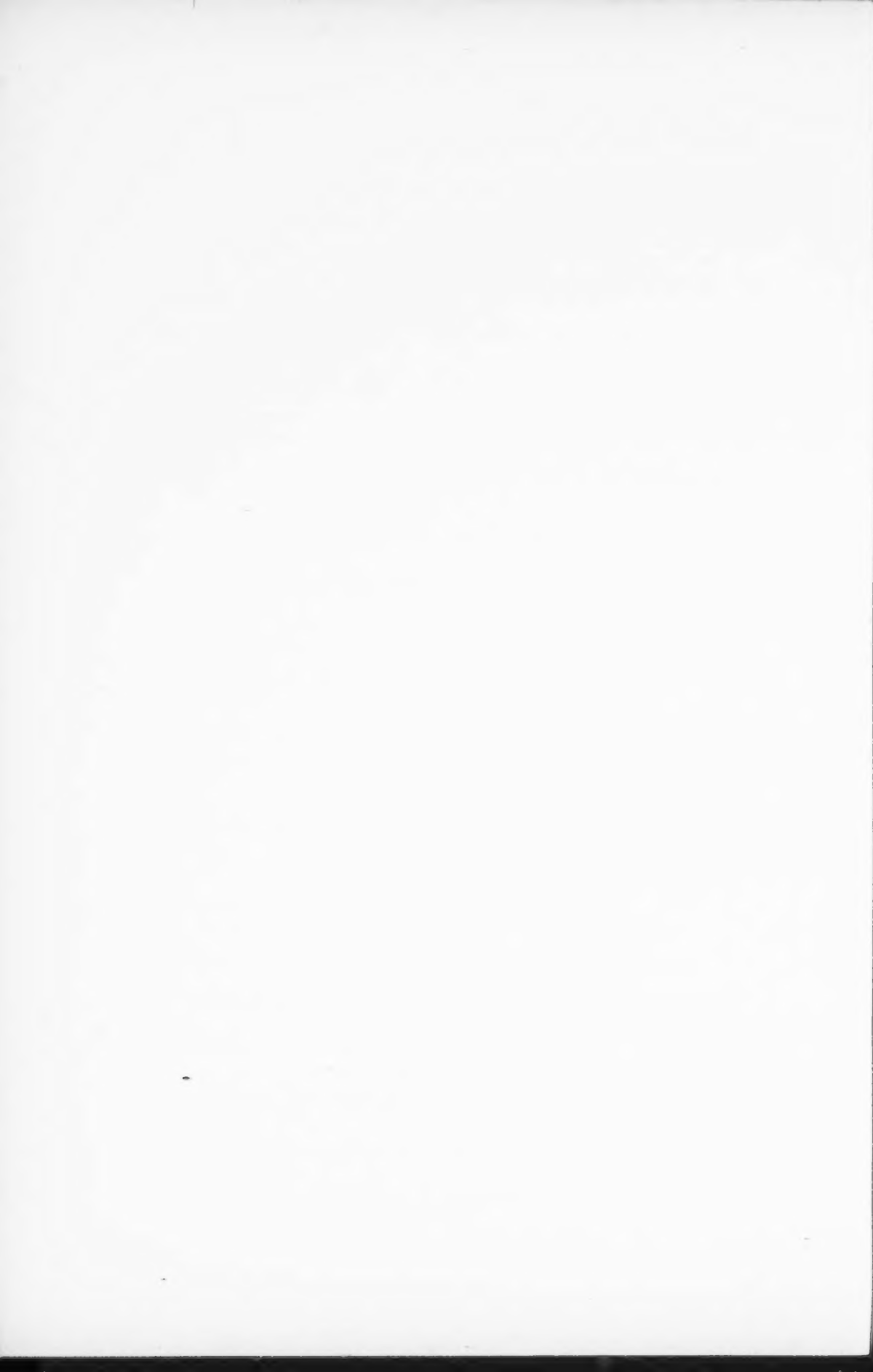
TO: PLAINTIFFS, LEO MAGYAR and MAGDALENA
MAGYAR, In Propria Persona:

NOTICE IS HEREBY GIVEN that the Motion
for Summary Judgment of defendants, BENNET
OLAN, ESQ., LESTER FRIEDMAN, ESQ., LINDA

HORNER, ESQ., and CHARLES CORREIA, ESQ. came before the Honorable Eric Younger, Judge presiding in Department 18 of the above-entitled court located at 111 North Hill Street, Los Angeles, California. Rick D. Navarrette of the law firm of Baker, Silberberg & Keener appeared on behalf of defendants and moving parties. Plaintiff Leo Magyar, appeared in propria persona.

After reviewing the papers submitted in support of the Motion, and entertaining oral argument, the Court granted defendants Motion for Summary Judgment finding that there was no triable issue of material fact and defendants were entitled to judgment as a matter of law. DATED: December 20, 1989
BAKER, SILBERBERG & KEENER

THOMAS F. MCANDREWS
Attorney for Defendants,
BENNET OLAN, ESQ.
LESTER FRIEDMAN, ESQ.
LINDA HORNER, ESQ.
CHARLES A. CORREIA, ESQ.



APPENDIX G

NOTICE OF RULING
WORDED AND SIGNED
BY RESPONDENTS
SUPERIOR COURT OF CALIFORNIA
MAGYAR V. OLAN (C603609)
DATED: SEPTEMBER 18, 1989



BAKER, SILBERBERG & KEENER
2850 Ocean Park Boulevard
Suite 300
Santa Monica, California 90405
Telephone: (213) 399-0900

Attorneys for Defendants
BENNET OLAN, ESQ.
LESTER FRIEDMAN, ESQ.
LINDA HORNER, ESQ.
CHARLES A. CORREIA, ESQ.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

LEO MAGYAR and MAGDALENA	)	Case No.C603609
MAGYAR,)	
)	
Plaintiffs,	)	NOTICE OF RULING
)	
vs.)	
)	
BENNET OLAN, et al.,)	
)	
Defendants.)	
)	

TO: PLAINTIFFS, LEO MAGYAR and MAGDALENA
MAGYAR, In Propria Persona:

PLEASE TAKE NOTICE that on September
13, 1989, in Department 18 of the Los
Angeles Superior Court, Central District,

the Honorable Judge Younger held a Status Conference and ruled as follows:

1) That the date of December 11, 1989 has been pre-cleared with the Court's calendar to hear defendant's Motion for Summary Judgement;

2) That on the aforementioned hearing date of December 11, 1989, the Court will also hold a Status Conference. Judge Younger indicated that if defendants' Motion is denied, that he will, at that time, decide whether or not to send this matter into arbitration or give this matter a trial date;

3) Counsel for defendants, Olan & Friedman, was requested to give notice of the Court's rulings. DATED: 12/20/89

BAKER, SILBERBERG & KEENER

JOHN C. KELLY
Attorney for Defendants,
BENNET OLAN, ESQ.
LESTER FRIEDMAN, ESQ.
LINDA HORNER, ESQ.
CHARLES A. CORREIA, ESQ.

